

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

GUARDIAN ON BEHALF OF  
STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2014080645

**DECISION**

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 13, 2014, naming San Francisco Unified School District (San Francisco). Student subsequently filed a motion to amend the complaint with a proposed amended complaint, and OAH granted the motion to amend the complaint on September 8, 2014. A joint request for continuance of the due process hearing was granted on October 27, 2014.

Administrative Law Judge Rebecca Freie heard this matter in San Francisco, California on December 8, 9, 10, and December 15, 2014; and January 9, 16, and 23, 2015.

Student was represented by Patricia Siehl and Sheila Brogna, Attorneys at Law. Guardian attended the entire hearing.<sup>1</sup>

Damara Moore, Attorney at Law, represented San Francisco. Lisa Miller, Director of Special Education for San Francisco, attended the hearing as its representative.

A continuance was granted to allow the parties to file written closing arguments and the record remained open until February 9, 2015. Student and San Francisco filed timely closing arguments, the record was closed, and the matter was submitted for decision.

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<sup>1</sup> Guardian is Student's great-aunt and legal guardian.

## ISSUES<sup>2</sup>

- a) Did San Francisco deny Student a free appropriate public education by failing to find her eligible for special education as a student with a specific learning disability (SLD) or other health impairment (OHI), at an individualized education program team meeting on May 28, 2013?
- b) Did San Francisco deny Student a FAPE by failing to find her eligible for special education as a student with an SLD, or OHI at an IEP team meeting on April 16, 2014?
- c) Did San Francisco commit a procedural violation by failing to provide Guardian with San Francisco's psychoeducational assessment report upon completion of the report and prior to the IEP team meeting of May 28, 2013, thus denying her meaningful participation in the IEP development process?

## SUMMARY OF DECISION

This Decision finds that Student failed to meet her burden and show that San Francisco erred by finding her ineligible for special education under the eligibility categories of specific learning disability or other health impairment at IEP team meetings on May 28, 2013, and April 16, 2014. Finally, Student did not show that San Francisco was required to provide Guardian with a copy of the assessment prior to the IEP team meeting and therefore, no procedural violation occurred.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student began residing with Guardian and her husband (jointly referred to as Guardians) within the boundaries of San Francisco in June 2012 when she was placed with them by the juvenile court. Several months before then Student had been removed from her biological mother's custody and placed in foster care. Student began attending Sheridan Elementary School (Sheridan) at the beginning of the 2012-2013 school year.

2. Student was diagnosed at birth with Fetal Alcohol Syndrome Disorder (FASD) due to her biological mother's alcohol and drug use during pregnancy. She was diagnosed with Attention Deficit Hyperactivity Disorder (inattentive type) (ADHD) when she was in

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<sup>2</sup> The issues have been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student dismissed a fourth issue concerning the timely provision of school records to Guardian at the beginning of the hearing.

foster care, and has also been diagnosed with Post-Traumatic Stress Disorder (PTSD). She has been monitored for developmental delays and other symptoms related to FASD for most of her life, and receives therapy for her PTSD which is believed to be caused by the neglect she suffered in her biological mother's care. Guardian has known Student since she was three days of age and has been very actively involved in her life, including taking her to medical appointments and meeting with all of the medical professionals involved in her case.

### *Standards-Based Grading System*

3. Student contends that her academic performance should not have caused San Francisco to find her ineligible for special education. Further, Guardians at one time mistakenly believed Student was not performing as well as she could, and later that teachers were inflating her grades, because Guardians did not understand the grading system used by San Francisco in elementary schools.

4. Sheridan is on a trimester schedule with report cards being issued three times during the school year. Report cards do not report traditional letter grades for each subject a student studies during the school year. Instead report cards are "standards-based."

5. During the 2012-2013, and 2013-2014 school years, the report cards were based on grade-level standards established by the California Department of Education.<sup>3</sup> Grade-level standards are expectations of what a student in a certain grade should achieve educationally in terms of skills, understanding concepts and the application of those skills by the end of that school year. Each grade level has its own set of standards, with multiple standards for most courses of study.

6. Each trimester of the 2012-2013 and 2013-2014 school year, Student was given a level on the California standards for each area of study. A level of four means the student "exceeds the standard;" three means the student "meets the standard;" two means the student is "approaching the standard;" and one means the student "needs more time/practice to develop" proficiency. It is not expected that a student will begin the school year at level three or four for most standards, since the standards are introduced through the curriculum during that school year and are expected to be met by the end of the school year. Some standards will not be addressed in a specific trimester, and some may be met earlier than the end of the school year, if the curriculum is covered earlier in the year.

7. Examples of the standards found on Student's second grade report card for the 2012-2013 school year follow. For example, in the area of language arts, three major skill areas are addressed: reading, writing, and listening and speaking. Each major skill area is

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<sup>3</sup> California adopted the common core curriculum for the 2014-2015 school year, and standards reported during the 2014-2015 school year are based upon the common core standards. Common core standards in "English Language Development" were also reported on during the 2013-2014 school year.

broken down to sub-skills with one or more standards that are expected to be met by the end of the school year. In reading, one sub-skill area is “Reading: Decoding.” Three standards are to be met for a student to achieve or exceed grade level competency in this area. The first standard requires the student to “Recognize and use spelling patterns when reading.” The second standard requires the student to “Appl[y] knowledge of syllabication when decoding multi-syllabic words.” The third standard requires the student to “[Understand] the use of regular and irregular plurals.”

### *2012-2013 School Year*

8. Student entered second grade at the beginning of the 2012-2013 school year. Her teacher was Edwin Casallas. Mr. Casallas is a California credentialed teacher and taught third grade at Sheridan from 2008 to the end of the 2012-2013 school year. Mr. Casallas had conversations with Guardian at least weekly. He often sent his students home with homework, including a requirement that a student read 15-30 minutes each night. He also sent home a language arts worksheet and a math worksheet several times a week. The worksheets covered the same work being done in the classroom. Mr. Casallas did not grade homework, nor was a student marked down for not turning in homework. Scoring on the standards was determined by his observations of a student, and the results of quizzes and tests. He did not indicate mastery of a standard unless Student demonstrated it.

9. Guardians worked with Student to help her complete her homework. However, Student often became frustrated and cried and threw tantrums, so the homework often took one to three hours to complete, although the evidence established that it should only have taken no more than 30-60 minutes to complete at most. Guardian believed it was necessary for Student to complete all homework in order to be successful in school.

10. Student did not demonstrate behavioral issues at school, and got along well with other students in the class. She was one of the better students academically in the class that school year, understanding concepts when they were first taught faster than most of the other students. Student did not present as a child who required specialized academic instruction in order to access the curriculum.

11. San Francisco has a screening tool, the Common Learning Assessment (CLA), which it uses to assess students’ academic needs and whether they are making progress academically in language arts and mathematics. Teachers administer the CLA to determine whether an individual student is making progress on meeting the grade level standards. The results are used to determine specific teaching strategies for each student and if the material needs to be retaught. The data is shared with parents, but is not used for report card grading purposes. Different standards are explored each time the CLA is administered to a specific student. Student’s CLA scores for second grade were all in the “Benchmark” range, meaning she was at the expected level for meeting the standards each of the three times the CLA was administered during the 2012-2013 school year.

## STUDENT'S FIRST AND SECOND TRIMESTER REPORT CARDS

12. When Student received her first trimester report card in the fall of 2012, 44 academic standards were measured. Student was at a level one in 12 standards, a level two in 28 standards, and a level three in four standards. Six standards were not measured. Guardian was concerned because Student had ones and twos. Therefore, she arranged for a friend, Deborah Ward, to begin tutoring Student.<sup>4</sup> Guardian was fearful that Student would be subjected to lower expectations because she was African-American, and did not want Student to fall behind in school; she wanted Student to excel.

13. Although Guardian communicated with Mr. Casallas frequently about Student, she only observed her in class a few times for 10 to 15 minutes through a window. She was concerned that if she observed in the classroom, where she could hear as well as see what was going on, she would be a distraction for Student. The same was true during the next school year.

14. When report cards were issued for the second trimester in late February or early March 2013, Student was rated on 49 standards. She received no level ones, seven level twos, 34 level threes, and eight level fours. At this time, Ms. Ward's periodic tutoring sessions became more formalized, and she would work with Student for one to three hours each weekend.

15. Many schools convene a Student Success Team (SST) meeting when there is concern about a student's behavior and/or academic progress. An SST meeting may result in the development of strategies to help the student succeed academically and/or behaviorally, and/or may result in a referral for a special education assessment. An SST meeting was held on March 14, 2013, because Guardian raised concerns about what she perceived as Student's lack of achievement in school and the amount of time Student was spending on homework. The meeting notes reflect that Mr. Casallas commented that sometimes Student would get tired and not complete an activity in class. The SST developed some strategies designed to assist Student to improve her academic achievement. However, the evidence did not establish that Student suffered from chronic fatigue or lethargy on a frequent basis in the classroom. Following this meeting, Guardians asked that Student be assessed for special education. San Francisco provided Guardians with an assessment plan, which they signed, and an assessment for special education was undertaken.

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<sup>4</sup> Ms. Ward has a bachelor's degree in political science and economics, and a master's degree in public policy and finance. She is retired from public employment and has held several positions with public agencies, including chief financial officer for the San Francisco Municipal Transit Authority. She has also worked for several years as a summer volunteer for a literacy program, and has 40 hours of training each year by the program.

## SAN FRANCISCO'S PSYCHOEDUCATIONAL ASSESSMENT

16. Student was assessed by Jeannette Alcaráz, a school psychologist, who is no longer employed by San Francisco and did not testify at the hearing. Ms. Alcaráz did not testify at the hearing because she left her position as a school psychologist for San Francisco for family reasons at the end of the 2012-2013 school year. Academic testing was conducted by Sandra Degan, a special education teacher who is now retired from San Francisco. Ms. Degan also did not testify.

17. Student did not challenge the qualifications of either Ms. Alcaráz or Ms. Degan, and the evidence established that they were qualified to conduct the assessments. The assessment met all legal requirements, in that a variety of assessment tools were used, they were correctly administered, they were used for the purposes intended, and they were not biased in any way. At hearing Student attempted to produce evidence that Ms. Alcaráz should have included additional information in her report, such as the time it took Student to respond when untimed tests were administered, and that she should have administered additional tests, but she did not meet her burden of proof.

18. Ms. Alcaráz completed a written report summarizing the results of the assessment, including Ms. Degan's testing. The report showed that Ms. Alcaráz relied on interviews with Student's teachers, Guardians, support staff and Student.<sup>5</sup> The report shows that Ms. Alcaráz reviewed records, and conducted observations of Student at school. To measure Student's cognitive abilities she administered the Differential Ability Scales. There was testimony that this assessment tool is approved for use with African American children in a school setting.<sup>6</sup>

19. To determine if Student had visual or auditory processing deficits, Ms. Alcaráz administered a subtest from Beery Developmental Test of Visual-Motor Integration – Fifth Edition (Beery), the Test of Visual Perceptual Skills (Test of Visual Perception), and the Tests of Auditory Processing Skills – Third Edition (Test of Auditory Processing).

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<sup>5</sup> Student contends that Ms. Alcaráz did not interview Guardians. However, the report contains a complete recitation of Student's developmental history with information that could only have been received from an interview of Guardians, which belies this contention.

<sup>6</sup> In California, school districts may not administer tests that measure a student's intellectual quotient if a student is African American. Other measures must be used to measure the cognitive abilities of an African American student. (*Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp.926, *affd. in pt., revd. in pt., Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969.)

20. Ms. Degan administered the Woodcock Johnson Tests of Achievement – Third Edition (Woodcock Johnson) to measure Student’s academic achievement. Finally, Guardian completed the Behavior Assessment Scales for Children – Second Edition (Behavior Assessment).

21. The Differential Ability Scale measures cognitive abilities in many areas, including verbal and nonverbal reasoning, spatial abilities, working memory and processing speed. Student produced no evidence that the Differential Ability Scale was administered incorrectly, or inaccurately assessed Student’s cognitive abilities. Student’s cognitive abilities were in the average range, according to the Differential Ability Scale, with relative strength seen in the verbal cluster. Her working memory and processing speed were also in the average range. A student in the average range of this testing is in the 25th to 75th percentile. Student’s lowest score put her in the 34th percentile, and her highest score was in the 73rd percentile.

22. Student’s scores on Test of Visual Perception were in the average range, indicating she did not have visual processing deficits. Student’s average score on the Visual-Motor Integration subtest on the Beery showed she did not have sensory-motor skills deficits. Further, Student’s scores on the Test of Auditory Processing were also in the average range, and did not reveal any auditory processing deficits.

23. Since the assessment report was issued on the last day of the 2012-2013 school year, Ms. Alcaráz had the benefit of reviewing the report card completed by Mr. Casallas for the end of the school year. Student ended the 2012-2013 school year with a report card that showed Student receiving 49 level fours, which meant she exceeded in meeting 49 of 50 standards measured. She met the remaining standard at a level three. Mr. Casallas reported that Student was reading above the second grade level, but needed to work on reading comprehension. In math Mr. Casallas stated that she needed to work more independently in solving math problems. He suggested that Student continue to practice reading, writing and math over the summer break. However, this was a recommendation he made for all his students in the end-of-year report card. When interviewed by Ms. Alcaráz, Mr. Casallas reported that Student was working at grade level, and although she could become distracted in the classroom, she was easily redirected and could finish her work.

24. Ms. Degan assessed Student’s academic achievement by administering the Woodcock Johnson. The Woodcock Johnson measures skill levels in each of the areas in which a student might be found to have an SLD: Oral Expression, Listening Comprehension, Written Expression, Basic Reading Skills, Reading Comprehension, Math Calculation, Math Reasoning, and Reading Fluency. It determines how a student compares to other students at the same grade level. Student scored in the average range in all areas tested, with the exception of Written Expression and Math Calculation in which she scored in the high range. Although Ms. Degan noted that Student was “fidgety or restless at times” during the assessment and “unusually absorbed by the tasks” during the assessment, she also reported that she was cooperative and persistent in completing the required tasks.

25. Ms. Alcaráz reported observing Student in several school settings as well as during the testing and reported that she “presents as a well-adjusted, happy child. . . . known to be a polite, kind and friendly student.” Ms. Alcaráz reported that Guardians believed Student was doing well. However, they were concerned that her diagnoses of FASD, ADHD, and PTSD, as well as a previous history of developmental delays might affect her learning potential. At the time the report was written Student was performing at grade level and did not have behavior problems.

26. Ms. Alcaráz reported that she interviewed Student and had her complete the children’s Sentence Completion Test. The assessment report contained responses that Ms. Alcaráz classified as “notable.” Of the 13 responses recorded in the report, three indicated Student had some concerns about “homework,” such as the response: “I’d be really happy if . . . ‘I didn’t have homework . . . .’”

27. The Behavior Assessment rating scales were given to Guardians and Mr. Casallas. Guardian completed the rating scale, but Mr. Casallas did not. However, failure of Mr. Casallas to complete the rating scale was not shown to affect the results of the assessment.

28. Responses to the rating scales are scored by computer. Dozens of statements concerning a child’s behavior and adaptive skills are rated by the responder as to what degree, if any, they are displayed by the child being rated. Guardian’s responses indicated she found Student in the “At-Risk” range in the areas of hyperactivity, anxiety, withdrawal, attention problems and activities of daily life. “At-Risk” means these are areas where attention should be paid to ensure they do not become “Clinically Significant.” A “Clinically Significant” behavior may indicate a need for further intervention, which might result in special education.

29. Guardian scored Student in the Clinically Significant range for depression. Given Student’s previous living situation with her biological mother, and her diagnoses of PTSD and ADHD, Guardian’s responses seem to accurately reflect Student’s behaviors and adaptive skills in the home setting and do not reflect, in and of themselves, eligibility for special education. Student did not present evidence, or assert in any manner, that either IEP team should have considered eligibility under the category of Emotional Disturbance.

30. Ms. Alcaráz concluded her 11 page report by opining that Student did not meet the special education criteria for either SLD or OHI. She did recommend that the IEP team consider creating a 504 plan for Student, and that visual aids be used with Student when she received auditory input, which includes putting instructions in writing.<sup>7</sup>

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<sup>7</sup> A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.



## IEP TEAM MEETING OF MAY 28, 2013

31. An IEP team meeting was held on May 28, 2013, to review San Francisco's psychoeducational assessment of Student, and to determine her eligibility for special education. Guardians, Mr. Casallas, Ms. Alcaráz, and Ms. Degan attended the meeting.<sup>8</sup>

32. Mr. Casallas described Student's performance in school. She was at the top level of average compared to other children in the class. Although Guardians were concerned about her reading comprehension and frustration with math at home, her academic achievements at school, as confirmed by her report cards and Ms. Degan and Ms. Alcaráz's testing, established that Student did not have academic achievement below her cognitive ability. Rather, the testing showed her academic achievement was sometimes higher than her cognitive ability.

33. Even though Student had been diagnosed with ADHD in the past, her academic progress, as demonstrated by her report card and Ms. Degan's testing, contraindicated a finding that the ADHD was impacting her academically. The IEP team determined that Student did not meet the eligibility criteria for either SLD or OHI and the evidence at hearing showed that determination to be correct.

34. Student's receipt of tutoring and Guardian's ratings on the Behavior Assessment that were Clinically Significant for depression, did not support a finding by the team that Student needed special education. Although the IEP team agreed that Student did not qualify for special education, it agreed that a Section 504 plan would be discussed when school resumed in the fall.<sup>9</sup>

35. At the end of the summer break Guardians received the results of California Standardized Testing and Report Program (California Testing). This testing was completed towards the end of the 2012-2013 school year. Prior to the 2013-2014 school year it was expected that all California public school students in grades two through 11 participate in statewide standardized testing that was administered in April and/or May of each school year. Tests were scored centrally and reports then sent to parents and school districts at the end of the summer. The last of this testing occurred during the 2012-2013 school year, because legislation was enacted that terminated this testing. Student's scores for the California Testing were at the top of the proficient range (second to highest range) in both English Language Arts and Mathematics, showing that Student was meeting grade level standards. This further supported the decision of the IEP team on May 28, 2013, that Student was not eligible for special education as a child with an SLD or OHI.

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<sup>8</sup> Sheridan principal, Dena Edwards may have also attended the meeting, but that is not reflected on the IEP forms from that meeting.

<sup>9</sup> OAH does not have jurisdiction over 504 plans, so any failure of San Francisco to create or implement such a plan for the 2013-2014 school year will not be addressed in this Decision.

### *2013-2014 School Year*

36. During the summer of 2013 Ms. Ward continued to tutor Student, preparing her for third grade reading and math by using purchased materials. During the summer break Guardians asked that San Francisco fund an independent educational evaluation, and this request was granted.

37. Student began the 2013-2014 school year in third grade with teacher David Scott. This was Mr. Scott's 17th year of teaching. In late September 2013, Guardian's husband died unexpectedly. This delayed the independent assessment. However, it created a bond between Mr. Scott and Student, because Student confided in him about the effect this loss had on her, and he and Student had many conversations about this over the course of the school year as she processed her grief. It was clear during his testimony that Mr. Scott had a very close relationship with Student, and this bolstered his credibility regarding Student's academic achievement, and lack of need for special education.

#### STUDENT'S FIRST AND SECOND TRIMESTER REPORT CARDS

38. For the 2013-2014 school year a third grade student was evaluated on a total of 47 academic standards. Not all were measured each trimester. Further, Mr. Scott explained that while a student might meet or exceed a standard during one grading period, some of the standards became more difficult to meet as the year progressed, which might result in a student being scored as meeting the standard one trimester, and approaching the standard the next grading period. Some of the standards on the third grade report card were labeled "ELD" for English Language Development. These standards were scored differently, with categories of Emerging, Expanding and Bridging. Emerging was the lowest level of achievement. Other standards were labeled "Reading Foundational Skills," and these were marked with a "P" when a student demonstrated proficiency, and an "N" when the student "need[ed] more time/practice to develop."

39. Student again struggled in third grade with homework completion, and tutoring with Ms. Ward continued. However, her scores on the standards-based report card reflected academic progress.

40. Student's first trimester report card was issued on November 13, 2013, and measured 34 standards. For those using the numbered system of measurement, Student had four level twos, 13 level threes, and seven level fours. She had five "Emerging" marks for the standards in ELD, and five P's for the five Reading Foundational Skills standards.

41. Student's second trimester report card was issued February 14, 2014. This report card was the last issued before the IEP team meeting of April 16, 2014. This report card measured progress for 41 standards. Student received 10 level twos (but six had not been measured the previous trimester), 12 level threes, and seven level fours for the standards given numbers to measure achievement. For the English Language Development

standards four were marked as “Emerging”, and one was “Expanding.” For the Reading Foundations Skills standards, Student was proficient in all five. Between the first and second trimester, Student’s marks had not decreased on any standard.

42. Mr. Scott knew that Student had been diagnosed with ADHD and she was often searching her backpack for materials. However, she completed her work in class, although Guardian complained that she had difficulty completing homework at home. Like many other students, she was reluctant to raise her hand and ask questions if she did not understand something. In terms of math, Student received a two on one of the standards one trimester because she had not fully memorized her multiplication facts. In terms of his comments about her reading comprehension, Mr. Scott found that Student had trouble determining the main point of something she read. He considered Student to be average to above average academically.

43. Mr. Scott had administered the CLA to Student twice in the time leading up to the IEP team meeting of April 16, 2014. The first time he administered it in the fall of 2013, Mr. Scott had placed Student near the top of the Benchmark range in both English Language Arts and Mathematics. The second time he administered the CLA Student she was in the range below Benchmark, “Strategic,” which indicated she needed additional help in mastering the standards tested at that time.

#### THE INDEPENDENT EDUCATIONAL EVALUATION

44. San Francisco’s 2013 psychoeducational assessment had a specific purpose: to determine if Student met the eligibility criteria for special education. Because all the results of the testing done showed Student in at least the average range both cognitively and academically, her teacher and Guardians did not report that she had behavioral or social-emotional issues that were impacting her education, and there was no indication of a processing disorder, the testing performed was sufficient. Further, the assessment considered Student’s educational progress as measured by her report cards, and Mr. Casallas’s independent determination. It was clear at the IEP team meeting of May 28, 2013, that Student was able to access the curriculum and was making academic progress in the general education classroom.

45. Student’s expert, Michelle Limon Freeman, Psy.D., a neuropsychologist, assessed Student as an independent educational evaluator. Dr. Freeman received her bachelor’s degree in psychology from California State University Sonoma in 2001, her master’s degree in clinical psychology from Pepperdine University in 2003, and her doctoral degree in 2008 from Alliant International University California School of Professional Psychology. She engaged in post-doctoral studies in neuropsychology. She has worked in the mental health profession since 2002, some of her positions as a trainee or intern. Dr. Freeman has been self-employed as the Executive Director and Founder of the Neuropsychological Evaluation Center in Walnut Creek since 2011.

46. Dr. Freeman's assessment was funded by San Francisco. Her assessment report stated that the reason for the assessment was "to better understand [Student's] learning style, what's impacting her comprehension and ability to focus, and what is contributing to her emotional and behavioral tantrums/outbursts." The information concerning Student's lack of comprehension, inability to focus, and emotional and behavioral tantrums/outbursts concerned Student's behavior at home in the homework/tutoring setting, and was received from Guardian, although Student also reported in her interview with Dr. Freeman that she had some attentional difficulties in the classroom. Dr. Freeman approached the assessment from the perspective that Student was having difficulties in school, as reported by Guardian, and therefore required further assessment to determine with greater specificity what was causing those problems, and how to address them. However, the evidence established that Student was not having problems in school. Rather, she was making academic progress as reflected in the report cards issued during the school year before the IEP team meeting of April 16, 2014. The problems reported by Guardian were problems at home when she was doing homework or receiving tutoring.

47. Dr. Freeman utilized 20 different assessment tools when she assessed Student, although with seven of them she only used some of the subtests to explore specific areas of perceived impaired functioning. She conducted four separate testing sessions with Student, each lasting at least two hours. Not all of Dr. Freeman's test results will be detailed in this Decision, only those that appear to be relevant in terms of Dr. Freeman's conclusions and diagnoses, or relevant in terms of the determination at the IEP team meeting of April 16, 2014, that Student was not eligible for special education.

48. Dr. Freeman's written report is 29 pages long. In the first 22 pages she summarizes Student's abilities in nine different areas: general cognitive ability, attention and executive functions, language functions, learning and memory functions, visual spatial functions, visual motor functions writing skills, mathematics, and emotional/social functioning. Summaries of the scores for each of the 20 assessment tools used are attached at the end of the report. However, specific tests and their results are not directly referred to in Dr. Freeman's discussion of Student's abilities in the nine different areas she assessed. This makes it difficult to determine how she reached some of her conclusions.

49. To assess Student's cognitive abilities Dr. Freeman used the Wechsler Intelligence Scale for Children – Fourth Edition.<sup>10</sup> The results of Dr. Freeman's testing using this instrument showed Student has cognitive abilities in the average range. However, additional testing to determine whether Student had a visual or auditory processing disorder was inconclusive. Although there were a few subtests administered to determine whether Student had a processing disorder in which she scored in the below average range, she was in at least the average range on the others that were administered.

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<sup>10</sup> Although the Wechsler Intelligence assessment is one of those prohibited by *Larry P.*, there is nothing in the law that prevents a private assessor from using this instrument to measure the cognitive abilities of an African American child.

50. To measure Student's academic achievement, Dr. Freeman used the Wechsler Individual Achievement Test – Third Edition (Achievement Test). This instrument measures academic achievement in the areas of reading, mathematics, writing, listening, and oral expression. Student was administered a total of 12 subtests on the Achievement Test. With one exception, Reading Comprehension, which had a standard score of 71, all of Student's standard scores were in the average range with a low of 88 and a high of 112.<sup>11</sup> Although Dr. Freeman testified that the low subtest score in reading comprehension showed a "significant discrepancy" that indicated Student should qualify for special education under the SLD category, a deficit in reading comprehension at the time of the April 16, 2014 IEP team meeting was not established by a preponderance of evidence produced at hearing.

51. Dr. Freeman administered the Gray Oral Reading Test (Gray) to further determine if Student had an SLD in the area of reading. While some of Student's results were below average range, for the most part, with scaled scores ranging from seven to nine (eight to 12 being in the average range), there was no evidence as to how this, in and of itself, established that Student has a specific learning disability in the area of reading. Dr. Freeman discussed the concept of "stealth dyslexia" in her report at some length, explaining how a lack of reading comprehension can impact a student's academic achievement, and ability to access the educational curriculum. But Student's academic achievement, as demonstrated by her report card grades and other information presented to the IEP team belied this testimony. There was no evidence that Student's below average and average scores on the Gray constituted a severe discrepancy that would qualify her for special education under the SLD eligibility criteria.

52. Dr. Freeman also expressed concern about Student's writing sample as part of the Test of Written Language, but she only administered two subtests from this instrument. One subtest concerning spelling and grammar had a scaled score of seven, and the other subtest, Story Composition, where the child is shown a picture and told to write a story about it, had a scaled score of nine. Student's standard score in written expression on the Test of Achievement was 88, within the average range. Therefore, no severe discrepancy was established.

53. To determine whether Student had a visual processing and/or motor skills deficit, Dr. Freeman administered the three subtests that comprise the Beery. The Beery uses standard scores. Student's scores for two of these three subtests were in the below average range, and the third subtest had a score in the average range. Student's score on the visual integration subtest administered by Dr. Freeman was 77. When Ms. Alcaráz administered the same subtest less than a year before, Student's score was 95. However, a student's test scores may vary depending on a variety of factors on the day a test is administered. Also, the results of other visual processing measures supported the higher score. A second subtest standard score that was in the below average range on the Beery, as administered by

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<sup>11</sup> A standard score between 85 and 115 is in the average range.

Dr. Freeman, Motor Coordination, was 75, but this was not a subtest administered by San Francisco. However, there was also testimony that some of the responses on the Beery are subjectively determined by the test administrator as to whether they are adequate. The evidence did not establish that Student had an auditory or visual processing disorder.

54. Student was diagnosed with ADHD in 2012 by the therapist treating her PTSD, whom she has seen weekly since that time. Dr. Freeman had Guardian complete several assessment questionnaires, and also had Mr. Scott complete two. Based on the resultant scores, Dr. Freeman opined that Student exhibited signs of ADHD. To rule out other causes, such as visual or auditory processing issues, she suggested Guardian take Student for assessments by specialists in these fields. By the time of the hearing, Dr. Freeman was able to confirm the ADHD diagnosis. However, there was no evidence that attention issues were causing Student to not make academic progress when the IEP team meeting was held on April 16, 2014. Therefore, the evidence did not establish that Student had a processing disorder in the area of attention that was causing her to not make academic progress.

55. Dr. Freeman diagnosed Student with a Specific Learning Disorder in the areas of reading and writing, based on the Diagnostic Statistics Manual – Fifth Edition (DSM-V). The DSM-V is used by appropriately licensed mental health professionals to diagnose scores of mental health and personality disorders. However, the special education eligibility criteria of SLD is not the same as the DSM-V criteria for Specific Learning Disorder. Further, although Dr. Freeman opined that Student might also suffer from dysgraphia, a condition that makes it difficult for a person to transmit thoughts in legible/written form, none of Student's teachers for grades two through four, testified that Student had problems in written expression, and this was born out by report cards and both Dr. Freeman's and Ms. Alcaráz's and Ms. Degan's assessments.

56. As previously discussed, Student has been diagnosed with ADHD. However, the evidence did not establish that she had limited alertness, vitality and strength in the school environment. There was no evidence that she required specialized academic instruction in order to access the curriculum. Rather, the evidence established that Student's needs could be met in the general education setting with teachers who could utilize general education strategies, and provide a student with accommodations and modifications as detailed in a 504 plan.

57. Dr. Freeman's report and testimony were given little weight. First of all, she used DSM-V criteria, to diagnose Student, and her report did not reflect the special education eligibility criteria for SLD and OHI. Further, she opined that one should not rely on grades or test scores to determine whether a student could access the curriculum and make academic progress in the general education setting. Dr. Freeman stated that she did not give much consideration to Student's second and third grade report cards because she did not know how the teachers were grading the Student. However, because these report cards were standards-based, they did not include factors such as homework completion and subjective test scoring. Also, Student's second grade California Testing scores were highly indicative that she was

able to access the classroom curriculum in second grade, and was learning well. Another area of concern in Dr. Freeman's report and testimony was her reliance on Student's percentile ranking when she did not perform at the level of 50 percent or more of all students tested. However, the average range of percentiles is considered to be 25 to 75 percent, and Student performed in the average or above average range in most of Dr. Freeman's testing.

#### THE IEP TEAM MEETING OF APRIL 16, 2014

58. The IEP team met at Sheridan on April 16, 2014. Present on behalf of Student were Guardian; Student's great-grandmother; Ms. Siehl; and Dr. Freeman. Present on behalf of San Francisco were Kathleen Consalus, school psychologist; Ms. Miller (who attended part of the meeting); Mr. Scott (who attended the meeting telephonically for an hour); Ms. Moore; Ms. Edwards; as well as a resource teacher at Sheridan and a special education administrator.

59. The meeting began with Dr. Freeman reviewing her assessment with the team and explaining that her results showed that Student had problems in the areas of reading, especially in comprehension. She informed the team that Student struggled with homework. She diagnosed Student with PTSD, Developmental Coordination Disorder (visual motor integration and fine motor skills), a Specific Learning Disorder (which affected reading and writing) and she recommended that Student be provided with one-to-one assistance and a smaller class.

60. Mr. Scott then described Student as she presented in his general education class. He and Dr. Freeman engaged in lengthy discussion concerning his observations and her findings. He stated that when Student entered fourth grade the next school year, she could utilize some accommodations and modifications since, although she was one of the better students in his class, the fourth grade classroom would have several more students (since both third grade classrooms would be moved into a single fourth grade classroom). He explained that he used some general education strategies, modifications and accommodations that assisted Student throughout the school year in his general education classroom.

61. Guardian shared her concerns about Student, explaining that she worked with a tutor at home, and struggled with comprehension. She explained that Student had learned to compensate for her weaknesses, and in the future this would impact her ability to learn. (This information was also contained in Dr. Freeman's report.) She also expressed concern that Student had "learning gaps," and concern about the ADHD, FASD, and depression over the death of Guardian's husband and the situation with her biological mother. Ms. Siehl expressed concern that both Mr. Scott and Mr. Consallas had recommended Student continue with some academics over the summer break. However, the evidence established that both teachers made this recommendation for all of their students since some may regress if they are not exposed to reading, writing and mathematics during the long summer break.

62. Ms. Consalus then discussed the criteria for special education eligibility under the categories of SLD and OHI. San Francisco personnel concluded that the information available to them at that meeting showed that Student was making academic progress and was successful in the general education school setting. Therefore, she did not demonstrate a need for special education. The possibility of accommodations and modifications via a 504 plan were then discussed.

63. The evidence at hearing supported the IEP team's decision that Student did not meet the criteria for special education as a student with and SLD or OHI at the time of the April 16, 2014 IEP team meeting. The only information before the team supporting such a decision was below average scores on some of the testing conducted by Dr. Freeman. However, these scores were not sufficient in and of themselves to support a finding of eligibility, especially in light of the fact that Student was accessing the curriculum and making academic progress.

#### *Provision of the San Francisco Psychoeducational Assessment to Guardian*

64. Guardians did not receive Ms. Alcaráz's report until they arrived at the IEP team meeting of May 28, 2014. Guardian believes that this resulted in them being unprepared when the IEP team meeting was held. However, Guardians did not ask for the report in advance of the meeting, and there was no evidence that San Francisco would not have provided a copy of the report earlier if they had known Guardians wanted it.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>12</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>13</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents and guardians are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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<sup>12</sup> Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

<sup>13</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents or guardians and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance her in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950. [In enacting the IDEA . . . , Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.*, at p. 950, fn. 10.)

4. The IDEA affords parents or guardians and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)

(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student has the burden of proof.

### *Eligibility Determinations*

5. Under the IDEA, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an “individual with exceptional needs” as a pupil who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code § 56026, subds. (a), (b).)

6. California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”<sup>14</sup> Thus, there are many children who have varying ranges of weakness, deficits, areas in need of improvement, and disabilities who do not qualify for special education because they do not meet the narrow categories specified by law for this federally funded program, including the requirement that the pupil’s instruction or services cannot be provided with modification of the regular school program.

7. The actions of an IEP team are evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) An IEP “is a snapshot, not a retrospective.” (Id. at p. 1149, quoting *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) at p. 1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

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<sup>14</sup> Effective July 1, 2014, several sections of title 5 of the California Code of Regulations pertaining to special education were revised to bring them into conformity with federal statutes and regulations pertaining to special education, and recent changes in California statutory special education law. However, since the IEP team meetings discussed in this Decision occurred prior to the new regulations going into effect, the older regulations are cited in these Legal Conclusions.

## PARTIES CONTENTIONS

8. Student contends that she has a disability due to her past diagnoses of FASD, ADHD and PTSD. Due to these conditions, San Francisco personnel should have been aware that her academic functioning would suffer in the future, particularly in light of her FASD. Therefore she should have been found eligible for special education as a student with SLD and/or OHI. Further, she contends San Francisco's assessment was unreliable because the school psychologist did not interview the Guardians or Mr. Casallas, and Mr. Casallas did not complete the Behavior Assessment. In addition, Student claims that the San Francisco assessment of 2013 was incomplete because it did not discuss how long Student spent responding to tasks in an untimed setting, and did not follow-up with additional testing when subtest results in the Differential Abilities Scale and Woodcock Johnson were not highly consistent. Further Student questions the validity of her grades in both second and third grades, and whether they accurately measure her ability to access the curriculum in the classroom. Finally, Student points to the results of Dr. Freeman's IEE, conducted in 2014, and testimony and statements from Student's third grade and fourth grade teachers that seemed to imply Student was struggling academically in the third grade, and continues to struggle academically in the fourth grade.

9. San Francisco argues that its 2013 assessment was not incomplete or otherwise flawed. Rather, it accurately reflected that Student was in the average range cognitively, and had average to above average academic scores. There was no evidence in San Francisco's testing that Student had processing deficits or required special education to access the curriculum. In regards to Dr. Freeman's report, San Francisco has many complaints about her failure to address the correct criteria for SLD and OHI eligibility. It also argues that Ms. Ward was not qualified to tutor Student, and questions whether Student was benefiting from the tutoring.<sup>15</sup> San Francisco argues that the IEP teams on May 28, 2013, and April 16, 2014, correctly concluded that Student was not eligible for special education under either of the categories of SLD and OHI.

## SLD ELIGIBILITY CRITERIA

10. Eligibility under the category of SLD means first that a pupil has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association,

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<sup>15</sup> Ms. Ward's opinion concerning Student's deficits was given little weight, and it is not necessary to make any determination as to whether Student received some benefit from her tutoring.

conceptualization and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) The criteria mandate the use of standardized achievement tests to measure the pupil's levels of academic competence and require finding a severe discrepancy of at least 1.5 standard deviations between the cognitive ability of the pupil and his or her academic achievement. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).) In the absence of a severe discrepancy on standardized assessments, an IEP team may nevertheless find such a discrepancy if it is documented. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).) SLD does not include learning problems that are primarily the result of visual, hearing or motor disabilities; intellectual disability; emotional disturbance; or of environmental, cultural, or economic disadvantage. (Ed. Code, § 56337, subd. (a).) As previously stated, eligibility criteria also require a student to be unable to access the curriculum without specialized academic instruction. ((Ed. Code § 56026, subds. (a), (b).)

*ANALYSIS OF THE IEP TEAM MEETING OF MAY 28, 2013*

11. San Francisco's 2013 psychoeducational assessment met all legal requirements. Although Guardian may not specifically recall being interviewed by Ms. Alcaráz, the report contains the necessary information concerning Student and her development. Further, Mr. Casallas's failure to complete the Behavior Assessment did not invalidate the assessment.

12. San Francisco uses the severe discrepancy standard to determine whether a student meets the criteria for special education as a child with an SLD. This requires a student to demonstrate a severe discrepancy between cognitive ability and academic achievement. Further, the discrepancy must be the result of a processing disorder in one or more areas of auditory or visual processing, sensory motor skills, inattention, or cognitive abilities. Finally, the Student must require specialized academic instruction in order to access the curriculum.

13. San Francisco's 2013 assessment showed Student's cognitive functioning was in the average range, and her academic achievement in all areas was in the average range, if not better. It did not show that Student required specialized instruction to access the curriculum. Further, Student presented as on task in the classroom, was not a behavioral problem, and was meeting or exceeding all of the standards she was expected to meet at the end of that school year.

14. The San Francisco 2013 assessment showed that Student did not have a visual or auditory processing disorder. Although a diagnosis of ADHD may qualify a student for special education under the eligibility category of SLD, it must be shown that the ADHD is affecting her ability to access the educational curriculum, and that she requires specialized academic instruction in order to access the curriculum. San Francisco's 2013 assessment, showed that Student was able to access the curriculum, notwithstanding her diagnosis of ADHD, and that she did not need specialized academic instruction to do so, based on the results from the Woodcock Johnson, and her performance as reflected in the standards-based report card for her second grade school year.

15. The San Francisco psychoeducational assessment reflected Student's average cognitive abilities, a lack of processing disorders, and average to above average academic achievement. The testimony of Mr. Casallas was given much weight. He was the only witness who observed Student in the classroom setting consistently during the 2012-2013 school year, and credibly testified that Student was near the top of the class academically, and showed no need for special education. The psychoeducational assessment did not contain any information that there was a severe discrepancy between Student's cognitive abilities and academic achievement. Student's scores on the California Testing further bolstered the IEP team's decision that she was able to access the general education curriculum without special education.

16. The tutoring of Ms. Ward may have been an additional support for Student's learning, but Student did not meet her burden of proof that she would not have succeeded academically without this tutoring. Further, although Guardians may have had some struggles with Student completing homework, Mr. Casallas testified credibly that completion of all schoolwork and homework was unnecessary for Student to make academic progress. Guardians' homework struggles with Student may well have been a "battle of wills," due to their insistence that all assignments be completed each and every day.

17. At the IEP team meeting of May 28, 2013, the information available to the team included the San Francisco psychoeducational assessment, Student's report card, and input from Mr. Casallas and Guardians. Based on all of the information available to the IEP team on May 28, 2013, the correct decision was made to find Student ineligible for special education as a child with SLD.

#### *ANALYSIS OF THE IEP TEAM MEETING OF APRIL 16, 2014*

18. Dr. Freeman's report reflects a prodigious effort on her part to determine why there was a discrepancy between Student's cognitive ability and her standard score of 71 on the single subtest in Reading Comprehension on the Test of Achievement. Dr. Freeman also expressed concern about Student's written work. While moderate impairment in reading was reflected by the results of the Gray, most of the tests Dr. Freeman then conducted to see if Student had visual and/or auditory processing disorders, and/or motor deficits, had scores in the average range.

19. Dr. Freeman found that Student met the DSM-V criteria for a Specific Learning Disorder in reading and writing, but this diagnosis does not qualify her for special education without a showing that she meets the criteria for SLD as established by the IDEA, and California statutory and regulatory law. In order to meet this criteria, the student must not only show a severe discrepancy between cognitive ability and achievement, but the discrepancy must also be due to a processing disorder, and the combined result must then be an inability for the child to access the general education curriculum without specialized academic instruction. Dr. Freeman's report did not establish that Student had a severe discrepancy between cognition and academic achievement, or a processing disorder. Nor did

the testimony of any other witnesses establish this. Further, it was concerning that Dr. Freeman ignored, both in her report and in her testimony, the evidence via report cards and test results that Student was doing well in school and was able to access the curriculum with general education accommodations and strategies.

20. Based on Student's academic progress, as shown by report cards, California Testing, San Francisco's previous psychoeducational assessment, and the comments of Mr. Scott at the IEP team meeting, the IEP team on April 16, 2014, correctly found that Student did not meet the criteria for special education as a child with SLD. Like Mr. Casallas, Mr. Scott's testimony was given great weight because he saw Student on a daily basis, and could see both her strengths and weaknesses based on her daily interaction with him. And though Ms. Ward's tutoring may also have been a support for Student during the 2013-2014 school year, Student failed to meet her burden of proof that she would not have succeeded academically without it.

#### OHI ELIGIBILITY CRITERIA

21. A student is eligible for special education and related services in the category of OHI if he meets the following criteria:

A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. (Cal.Code Regs., tit. 5, section 3030, subd. (f).)

ADHD may be a qualifying health condition for other health impairment, but all the requirements of the definition above still must be met. (Ed. Code, § 56339, subds. (a), (b).) As previously stated, eligibility criteria also require a student to be unable to access the curriculum without specialized academic instruction. (Ed. Code § 56026, subds. (a), (b).)

#### *ANALYSIS OF IEP TEAM MEETING OF MAY 28, 2013*

22. In regards to eligibility as a child with OHI, the San Francisco psychoeducational assessment contained information concerning Student's multiple diagnoses of FASD, ADHD, and PTSD. However, the mere evidence that a student suffers from a medical or DSM-V diagnosis does not mean she meets the criteria for special education under the IDEA or California law. Student did not establish that she had impaired vitality, strength or alertness at school due to any of these diagnoses. Further, as previously discussed, the San Francisco psychoeducational assessment showed that Student was making academic progress as shown by her Woodcock Johnson Scores. And this was also reflected in her report cards for that school year, and comments from Mr. Casallas that he made when providing information to Ms. Alcaráz, and at the IEP team meeting. There was no showing

that Student needed specialized academic instruction in order to access the curriculum. She was accessing it quite well without anything more than some general education strategies by Mr. Casallas. Accordingly, the IEP team was correct when it found Student was not eligible for special education as a child with OHI.

#### IEP TEAM MEETING OF APRIL 16, 2014

23. This IEP team also correctly found that Student did not meet the eligibility criteria as a child with OHI. Her diagnoses of FASD, ADHD, and PTSD, should cause one to look at how she is functioning in school, and whether she does meet the OHI criteria. However, as previously discussed, all of the information available to the IEP team at the time of this meeting did not show a child who was not accessing the general education curriculum and therefore needed specialized academic instruction. The testing by Dr. Freeman in the areas of cognition and academic achievement showed that Student had average cognition, and with the exception of the Reading Comprehension subtest on the Wechsler Achievement test, she was academically average or above average. Although Student told Dr. Freeman that she struggled at school, there was no showing that she had impaired vitality, strength or alertness at school. Finally, Student's California Testing from the previous school year, and her first and second trimester report cards for the 2013-2014 school year, demonstrated that she was accessing the curriculum and receiving educational benefit in the general education setting.

#### *Failure to Provide Parent San Francisco's Assessment prior to the May 28, 2013 IEP Team Meeting*

24. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent or guardian's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent or guardians' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

25. Education Code section 56329, subdivision (a) (3), requires a school district to give a copy of an assessment report to a parent or guardian. However, there is nothing in the the IDEA, the Education Code, or federal or California regulations that require the assessment report to be given to the parent or guardian at any specific time. This is consistent with federal law.

26. Student contends that guardians should have been provided with San Francisco's psychoeducational assessment at some time before the May 28, 2013 IEP team meeting, and because the report was not provided to them in advance, they were significantly impeded in the decision-making process at that meeting. However, there is no statutory or regulatory requirement that parents or guardians be provided with an assessment at any specific time, other than laws concerning the provision of educational records to parents or

guardians. The law is simply that they be provided with the assessment. Furthermore, Guardian admitted at the hearing that Guardians did not request a copy of the report in advance of the IEP team meeting of May 28, 2013. Accordingly, there was no procedural violation.

### ORDER

Student's requests for relief are denied.

### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, San Francisco prevailed on all three issues.

### RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: February 27, 2015

/s/

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REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings